United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-7430

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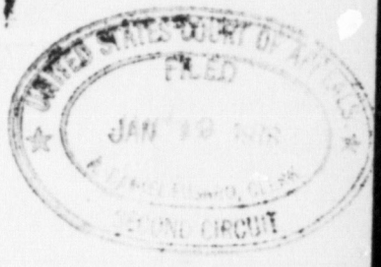

BP/S

RICHARD HUGHES,

Plaintiff-Appellant,

—against—

GENERAL MOTORS CORPORATION,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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TABLE OF CASES

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REPLY BRIEF FOR PLAINTIFF-APPELLANT

The central question raised here is whether the Trial Court erroneously prevented plaintiff-appellant from meeting his burden of persuading the jury that an alleged design defect caused his injuries. The Court should recognize that defendant-appellee's reliance on admitted evidence as supportive of the jury verdict begs the appellate question and is designed to provoke a "substantial justice" affirmance.

While we recognize that this Court may be reluctant to interfere with judicial management at the trial level, it should be self-evident that the

rulings below on the admissibility of evidence were so pivotal as to deprive the plaintiff-appellant of a fair trial.

The discussion in defendant-appellee's brief on theory switching is meaningless. This case was ordered to trial without a pre-trial order over the objections of counsel. Plaintiff's contention that there was a cab fire independent from one under the hood was noticed in the plaintiff's complaint (7A) and answers to defendant's interrogatories (74A, 12A and 15A).

Repeating a tactic successfully employed at trial, General Motors dwells (pp. 4 through 7) on the maintenance history of the truck. This is a red herring. Not a single repair was performed or required for the fuel tank or the filler neck assembly, the parts which plaintiff claimed were defectively designed. The only repair that even remotely involved the fuel system was the replacement of a gasoline filter which may have required disconnection of the fuel line within the engine compartment some 4 months prior to the accident.

It was plaintiff's view at the trial (Tr. 548) that the introduction of the maintenance history of the truck was not relevant to the claim of design defect and would seriously prejudice the jury's attention from consideration of the relevant evidence on design defect. Exception was taken to the Judge's charge on the jury's consideration of the maintenance history of the truck (383A). The defendant's expert witness conceded on cross-examination that the fuel tank and filler neck did not require periodic maintenance (394A). The filler neck assembly was deliberately located in an area between the exterior and interior walls of the cab (394A, 397A, 402A).

Scanlon v. General Motors Corp., 65 N.J. 582, 326 A.2d 673, under the foregoing circumstances aids the plaintiff-appellant. *Scanlon* involved a defect in the manufacture of an automobile part which became manifest after only 4000 miles of driving. Mr. Hughes, on the other hand, alleged and sought to prove a design defect which was born on the engineer's drawing board in Detroit, was present at the time of the fire, and which was not subject to maintenance or modification as the result of usage. It is in precisely such

a case that the *Scanlon* court acknowledged that "mere age alone may not be sufficient to preclude an inference of a defect existing in the hands of the manufacturer"* 326 A.2d at 679.

Unlike the *Scanlon* case, *Bexiga v. Havir Manufacturing Co.*, 60 N.J. 402, 290 A.2d 281 (1972) involved an allegation that defendant's punch press was defectively designed because of the failure to equip it with a safety device. Plaintiff's expert testified concerning two safety alternatives, both of which were known in the industry at the time the product was sold. The New Jersey Supreme Court reversed the trial court's dismissal of the plaintiff's complaint:

> "We hold that where there is an unreasonable risk of harm to the user of a machine which has no protective safety device, as here, the jury may infer that the machine was defective in design unless it finds that the incorporation by the manufacturer would render the machine unusable for its intended purposes." 290 A.2d at 285.

The trial record shows that Mr. Hughes offered evidence of alternative design possibilities with respect to the location of the fuel tank and the design of the filler neck assembly. Each of these basic

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*The Trial Court would not instruct the jury accordingly. (533A-534A).

safety alternatives were available to defendant before 1966. These tenders of evidence were rejected by the Trial Court (tank location: 217A-223A; filler neck: 204A, 216A, 411-422A).

REPLY TO DEFENDANT-APPELLEE'S POINT I

Mr. Cole was the only person identified by discovery as qualified to discuss the problem of gasoline fumes and gasoline leakage escaping from the filler neck assemblies, as he described in his patent. The Judge barred his deposition. At the trial Mr. Cole's statement on the subject of leakage as derived from his sworn patent application was not received in evidence because plaintiff had failed to establish what was in Mr. Cole's mind when he made the statement (411A-422A).

It was outrageous to require plaintiff-appellant to surmount the burden imposed by this ruling of proving what was in Mr. Cole's mind through third persons.

REPLY TO DEFENDANT-APPELLEE'S POINTS II, III and IV

Three major submissions establishing design defect were rejected by the Trial Court, to wit: (a) the Cole patent, (b) the defendant's admission of subsequent

design change, and (c) the photographs of plaintiff which demonstrated that the source of heat was from the vicinity of the filler tube assembly. The elimination of these intertwined offers devastated the plaintiff's opportunity to persuade the jury.

With respect to (b) -- the subsequent repositioning of the fuel tank from the interior of the cab to a site outside and below -- there were sufficient facts in the record to indicate that the change in location was safety related. The defendant took great pride in what World War II combat experiences taught with reference to safety consideration in tank location. Putting the tank inside the cab would make puncture by bullet or other off-road obstacles less likely. "To protect the tank is to protect the passengers," Elwell testified (384A).

Assuming, without conceding, that admission of evidence of subsequent remedial measures must be predicated on a recognition of fault in the previous design, the plaintiff made such a showing. In the 1960's International Harvester, which defendant does not consider a major truck manufacturer (defendant-appellee's brief at p. 17), began offering trucks of the same

weight class as the GMC V4005, with fuel tanks outside the cab. The following year, in apparent realization that combat conditions were no longer relevant, the defendant offered purchasers of the V4005 the option of having the tank located on the outside and below the cab along the frame rail (388A, Pl.Ex. 33, 555A). Since 1973 the defendant has offered its light-medium duty trucks only with its gas tank located outside, behind and below the passenger cab (427A). These changes must have been referrable to the defendant's recognition that an accumulation of gasoline vapors was a distinct possibility in the refueling operation, since Elwell testified that vapors escape from the tank (and into or adjacent to the cab) when fuel is pumped in (426A).

Introduction of evidence of subsequent design changes is admissible so that a jury can infer from *it* that the change is referrable to a previous design shortcoming.

In *Smyth v. The Upjohn Co.* (Dkt. 75-7143, decided 12/2/75) this Court had occasion to apply the New York subsequent remedial measure rule to facts giving rise only to a claim for negligence. The Court acknowledged that the law of several states would admit such evidence for purposes other than a showing of negligence. This

Court relied, for example, on *Sterner v. U.S. Plywood-Champion Paper Inc.*, 519 F.2d 1352 (8th Cir. 1975), wherein claims of strict liability and negligence were alleged. In receiving evidence of subsequent modification in the defendant's warnings, the Eighth Circuit Court of Appeals held such proof was admissible but not to show negligence.

If the jury had been benefited by the graphic demonstration of plaintiff's burns they would have been irresistibly led to the conclusion that there was a substantial source of combustion from the general area of the filler tube assembly in the gas delivery system. If the jury had known that General Motors had received a warning of this very specific hazard from Mr. Cole before the truck in question was manufactured; if the jury had known that there were design alternatives available and in use at the time of manufacture and that the defendant subsequently eliminated this hazard by repositioning the gas delivery system, the proofs in the case against the defendant, instead of being sketchy and scant, would have been overwhelming and irresistible.

REPLY TO DEFENDANT-APPELLEE'S POINT V

Both parties agreed that gasoline vapors are heavier than air and thus have a tendency to fall (251A, 239A, 391A). Plaintiff still finds it incredible that defendant has the audacity to offer a version of the fire which flies in the face of this scientific fact. If indeed a fuel leakage had developed in the engine, it was empirically impossible for vapors to have emerged upwards through the slots in the cab floor, when in fact vapors tend to settle. For plaintiff to have treated this as part of his direct case would have been to negate the eyewitness testimony of Lieutenant Neebe and the observations of Fireman Price (plaintiff-appellant's brief at pp. 6 and 7) that the cab was the initial area of involvement.

In a clumsy effort to create the illusion that plaintiff had the opportunity for advance comment on defendant's theory during the plaintiff's case the defendant, in its Brief at p. 37, once again quotes Professor Weinstein's testimony outside its original context. At no time during the plaintiff's case did Professor Weinstein express any opinion on the emergence of a fire through holes in the cab floor.

The only context in which a spark or flame was mentioned was in connection with the possibility of their passing through holes in the *firewall* (that accommodated wires and hoses) to ignite an independent combustible level of fuel vapors emanating from the fuel tank and filler neck (195A, 241-242A, 311A).

The defendant's version of how the fire emerged into the cab was clearly a proper subject for rebuttal testimony.

CONCLUSION

THE JUDGMENT DISMISSING THE COMPLAINT SHOULD BE VACATED; THE DEPOSITION OF THE DEFENDANT BY EDWARD COLE SHOULD BE AUTHORIZED, AND THE CASE REMANDED TO THE UNITED STATES DISTRICT COURT FOR A NEW TRIAL.

Respectfully submitted,

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